UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SCOTT PELLEGRINO, on behalf of himself and all others similarly situated; and CHRISTINE VANOSTRAND, on behalf of herself and all others similarly situated, Plaintiffs, -against- NEW YORK STATE UNITED TEACHERS; UNITED TEACHERS OF NORTHPORT, as representative of the class of all chapters and affiliates of New York State United Teachers; NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT, as representative of the class of all school districts in the state of New York; ANDREW CUOMO, in his official capacity as Governor of New York; BARBARA UNDERWOOD, in her official capacity as Attorney General of New York; JOHN WIRENIUS, in his official capacity as chair of the New York Public Employment Relations Board; ROBERT HITE, in his official capacity as member of the New York Public Employment Relations Board, Defendants.	:	Index No. 18-cv-03439 (NGG)(RLM)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF

UNION DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

Since Defendants first moved it has only become more clear that Plaintiffs' remaining claims for retroactive agency fees and membership dues fail to state a claim and should be dismissed. Each of the arguments Plaintiffs present here to salvage this last portion of their Complaint has been squarely rejected by other courts in essentially identical circumstances.

Indeed, dismissal has been directed by every court in some 13 decisions (17 cases) to consider claims for retroactive agency fees paid pre-Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, AFL-CIO, __ U.S. __, 138 S. Ct. 2448 (2018). See, *infra* at 2-4. Several of those courts have also considered Plaintiffs' claims for recovery of previously paid membership dues and likewise rejected those claims. The same result should obtain here.

ARGUMENT

Based upon Union Defendants' and co-Defendants' moving briefs, Plaintiffs have, in their opposition papers ("Opp. Br."), agreed to dismiss all claims against all Defendants except 42 U.S.C. §1983 claims against Union Defendants pertaining to damages for the payment of (i) pre-Janus agency fees and (ii) union dues up to the amount of agency fees.[1] However, even these remaining claims fail to state a claim and should be dismissed.

I. THE GOOD FAITH DEFENSE BARS PLAINTIFFS' REMAINING CLAIMS

Plaintiffs admit that the good faith defense applies to claims brought under 42 U.S.C. §1983 against private actors for constitutional violations. See Opp. Br. at 6 ("[t]o be sure, the union's good faith could shield them from liability if the plaintiffs were suing to recover damages that extend beyond the mere recovery of their property"). In an effort to escape that reality, Plaintiffs tack on a handful of additional requirements to the application of the good

[1] See Comp., ¶¶45 (a-b)(class certification); (g) (for repayment of agency fees); (h) (compensatory damages for union members); (s)(seeking costs and attorneys' fees); and (t) (seeking other relief deemed just and proper).

faith defense which have no foundation in law, have been rejected by other courts considering post-Janus claims, and should be rejected here.

A. It Is Plaintiffs Who *Understate* The Strength Of The Good Faith Defense

In an unbroken line of decisions, District Courts have applied a good-faith defense to §1983 claims brought in similar circumstances seeking refunds of agency fees collected pre-Janus. See Doughty v. State Emp.'s Ass'n of N.H., SEIU, Local 1984, CTW, CLC, 19-cv-00053-PB (D. N.H. May 30, 2019), ECF No. 20, (judgment entered in accordance with Oral Order, transcript appended hereto); Babb v. Cal. Teachers Ass'n, 8:18-cv-00994-JLS-DFM, __ F. Supp. 3d __, 2019 WL 2022222, at *5-6 (C.D. Cal. May 8, 2019) (dismissing five cases consolidated for arguments and decision); Wholean v. CSEA SEIU Local 2001, 3:18-cv-01008-WWE, 2019 WL 1873021, at *3 (D. Conn. April 26, 2019); Akers v. Md. State Educ. Ass'n, No. RDB-18-1797, __ F. Supp. 3d __, 2019 WL 1745980, at *5 (D. Md. April 18, 2019); Bermudez v. Serv. Emps. Int'l Union, Local 521, 18-cv-04312-VC, 2019 WL 1615414 (N.D. Cal. April 16, 2019); Mooney v. Ill. Educ. Ass'n, 1:18-cv-1439, __ F. Supp. 3d __, 2019 WL 1575186, at *6 (C.D. Ill. April 11, 2019); Lee v. Ohio Educ. Ass'n, 366 F. Supp. 3d 980, 982-83 (N.D. Ohio 2019); Hough v. SEIU Local 521, 18-cv-04902-VC, 2019 WL 1785414, at *1 (N.D. Cal. April 16, 2019); Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, AFL-CIO, 15-cv-01235-RWG, 2019 WL 1239780, at *3 (N.D. Ill. Mar. 18. 2019) ("Janus II"); Carey v. Inslee, 364 F. Supp. 3d 1220, 1229 (W.D. Wash. 2019); Crockett v. NEA-Alaska, 367 F. Supp. 3d 996, 1006 (D. Alaska 2019); Cook v. Brown, 364 F. Supp. 3d 1184, 1192 (D. Or. 2019); Danielson v. Am. Fed'n of State, Cty., & Mun. Emps., Council 28, AFL-CIO, 340 F. Supp. 3d 1083, 1084-87 (W.D. Wash. 2018) ("Danielson II").

These rulings are in line with Jarvis v. Cuomo, 660 F. App'x 72 (2d Cir. 2016) (summary order), cert. denied, 137 S. Ct. 1204 (2017), the leading case on point in this Circuit. Jarvis

applied the good faith defense to bar recovery of agency fees collected from homecare workers following the Supreme Court decision in Harris v. Quinn, 573 U.S. 616 (2014), which invalidated agency fees for quasi-governmental employees. Plaintiffs fail to explain why Jarvis should not apply here. Plaintiffs mention Jarvis once, admitting that it both "allowed" application of the good faith defense to a union under analogous facts and rejected a claim for repayment of fees. Opp. Br., 8-9. Plaintiffs' lone criticism is that Jarvis did not explain at length why Plaintiffs' newly created argument regarding equitable relief did not apply. Id., 9.[2] As set forth in Section II, *infra*, Plaintiffs' equitable arguments fail. Therefore, the reasoning in Jarvis is directly applicable here.

Plaintiffs' attempt to undermine this vast weight of authority by citing a few cases that fail to address the good faith reliance defense is unavailing. Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983), does not undercut Clement v. City of Glendale, 518 F.3d 1090 (9th Cir. 2008) (applying the good faith defense to a search and seizure claim). See Opp. Br., 15. Howerton, which preceded Wyatt v. Cole, 504 U.S. 158 (1992) by a decade, merely notes that good faith reliance on law is an affirmative defense, not an immunity to suit. See Howerton, 708 F. 3d at n.10 (reversing dismissal of §1983 claim for failure to show conduct under color of state law and noting that there is no good faith "immunity" for private actors, but citing Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 942 n.23 (1982) for its suggestion that compliance with law is an affirmative defense). Howerton is consistent with Clement as well as post-Janus cases distinguishing good faith reliance from immunity and applying it as a defense. Downs v.

[2] Although Jarvis is a summary order, the Second Circuit recently stated that summary orders "merely apply established law to particular sets of facts. But precisely because such orders illustrate routine applications of established law, the pattern of results… can provide an informative survey of the kinds of cases in which a doctrine has been found unproblematically to apply or not to apply." Sung Cho v. City of New York, 910 F.3d 639, 646 n.7 (2d Cir. 2018). Jarvis considered facts and arguments nearly identical to the instant matter.

Sawtelle, 574 F.2d 1, 12 (1st Cir. 1978), relied upon by Plaintiffs (Opp. Br., 15), likewise addressed the question of extending qualified immunity pre-Wyatt.

Further, Plaintiffs' citation to Riffey v. Rauner, 910 F.3d 314, 315 (7th Cir. 2018) ("Riffey II"), is inapposite and misleading. On remand from the Supreme Court post-Janus, the Riffey II Court described its prior ruling in short hand, distinguishing what was before the court, class certification, from what was not before the court, liability. The Seventh Circuit recognized that any claims for repayment would be to subject to defenses, including the good faith defense. See id., at 319 (union would be entitled to litigate defenses). See also Riffey v. Rauner, 873 F.3d 558, 566 (7th Cir. 2017), cert. granted, judgment vacated, 138 S. Ct. 2708 (2018) (describing with approval the District Court's suggestion that a classwide issue might be stated "solely to adjudicate the affirmative defense of good faith" but noting that objectors did not request such a class).

B. Application of Good Faith Reliance Does Not Require A Scienter Component

In other post-Janus cases, District Courts have consistently rejected attempts by plaintiffs, based upon *dicta* in Wyatt, to limit the good faith defense to instances where the analogous tort contained a scienter requirement. See Danielson II, 340 F. Supp. 3d at 1086; Cook, 364 F. Supp. 3d at 1191; Carey, 364 F. Supp. 3d at 1229-30; Crockett, 367 F. Supp. 3d at 1004-05; Janus II, 2019 WL 1239780, at *2; Babb, 2019 WL 2022222, at *6. These rejections accord with Jarvis, which applied the good faith defense regardless of whether the analogous tort at common law required scienter. 660 F. App'x at 75; see also Winner v. Rauner, No. 15-cv-7213, 2016 WL 7374258, (N.D. Ill. Dec. 20, 2016).

Even if the good faith defense were predicated on a common law tort, it would not help for conversion is not the most closely analogous tort. Plaintiffs' First Amendment claim is based on Defendants' use of governmental process, N.Y. Civ. Serv. Law §208(3), to violate their First

Amendment rights. Thus, abuse of process is the most analogous tort and contains a scienter requirement at common law. See Cook, 364 F. Supp. 3d at 1191 (citing Wyatt, 504 U.S. at 164; Danielson II, 340 F. Supp. 3d at 1086); Crockett, 367 F. Supp. 3d at 1005-06 (abuse of process or tortious interference with contract are more closely analogous torts than conversion); Babb, 2019 WL 2022222, at *7 (post-Janus claims are similar to dignitary torts, like defamation or abuse of process). In New York, claims for abuse of process and tortious interference require intent. See Bd. of Educ. of Farmingdale Union Free Sch. Dist. v. Farmingdale Classroom Teachers Ass'n, Inc., Local 1889, AFT AFL-CIO, 38 N.Y.2d 397, 403 (1975); Lamb v. Cheney & Son, 227 N.Y. 418, 421 (1920). Therefore, "even under Plaintiffs' proposed rule, the good-faith defense is available to the Union Defendants." Babb, 2019 WL 2022222, at *6.

C. This Court Need Not Look Beyond the Pleadings To Grant The Motion

Plaintiffs assert that Defendants need prove with evidentiary submissions that they, in fact, complied with Abood pre-Janus and that they subjectively believed that this compliance was constitutional. Abood v. Detroit Bd. Of Educ., 431 U.S. 209 (1977). Opp. Br., 13-14. Neither requirement is supported by law or policy and each has been rejected by courts considering post-Janus claims. See Danielson II, 340 F. Supp. 3d at 1086; Cook, 364 F. Supp. 3d at 1193; Carey, 364 F. Supp. 3d at 1231; Mooney, 2019 WL 1575186, at *10; Babb, 2019 WL 2022222, at *7-8; Crockett, 367 F. Supp. 3d at 1007; Carey, 364 F. Supp. 3d at 1232.

Nothing beyond the Complaint is necessary to grant this motion based on the good faith defense. That Defendants acted pursuant to statutory provisions "appears on the face of the complaint," and, therefore, dismissal is appropriate without resort to summary judgment. See Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 74 (2d Cir. 1998).

First, Plaintiffs challenge agency fees in toto, and do not allege in the Complaint that Union Defendants received fees not permitted by Abood. That would have been a different

claim, which Plaintiffs did not make. Thus, any argument that discovery is needed in support of that claim, rather than the one alleged, does not "track." See Crockett, 367 F. Supp. 3d at 1007 (rejecting same claim).

Second, it is undisputed that Abood permitted agency fees from public sector employees. Opp. Br. at 13. Thus, even if some of Union Defendants' staff subjectively believed that Abood would be overruled by Janus, it would not establish a lack of good faith. See, e.g., Carey, 364 F. Supp. 3d at 1229 ("[A] defendant's expectation about future unconstitutionality is irrelevant because a defendant's own beliefs about what the constitution says hold no weight if they clash with their knowledge of clear judicial precedent. If anything, a defendant's belief that a prior holding will be overruled only serves to emphasize their awareness of a binding constitutional decree."). See also Danielson II, 340 F. Supp. 3d at 1086; Cook, 364 F. Supp. 3d at 1193; Carey, 364 F. Supp. 3d at 1231; Mooney, 2019 WL 1575186, at *10; Babb, 2019 WL 2022222, at *7; Crockett, 367 F. Supp. 3d at 1007.

Indeed, the Jarvis Court affirmed the dismissal of the §1983 claim, based on the good faith defense, on a 12(b)(6) motion. 660 F. App'x at 72; see also Winner, 2016 WL 7374258, at *5. Whether Defendants acted in good faith is a purely legal issue regarding application of the good faith defense and the state of the law pre- and post-Janus, requiring no factual development. See Danielson II, 340 F. Supp. 3d at 1086 ("Inviting discovery on the subjective anticipation of an unpredictable shift in the law undermines the importance of observing existing precedent and ignores the possibility that prevailing jurisprudential winds may shift. This is not a practical, sustainable or desirable model. The good faith defense should apply here as a matter of law.").

Cases relied upon by Plaintiffs are not to the contrary. Anderson v. Creighton, 483 U.S. 635, 660 (1987), addressed the immunity of state actors, not the good faith defense. Jordan v.

Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1278 (3d Cir. 1994), an early good faith defense case, noted a subjective belief component, but, contrary to Plaintiffs' assertions, cautioned against "incorrectly plac[ing] the burden of proving the defendants' *mens rea* on the defendants." Finally, Dainelson II, declined to extend Franklin v. Fox, No. C 97-2443 CRB, 2001 WL 114438, at *6 (N.D. Cal. Jan. 22, 2001), explaining that a union's official's subjective belief that the Supreme Court would overturn long-standing precedent, "would have amounted to telepathy." Danielson II, 340 F. Supp. 3d at 1086 (citing Winner, 2016 WL 7374258, at *5.)

D. Plaintiffs Fail To State A Claim On Behalf Of Union Members

To the extent Plaintiffs state a §1983 claim for pre-Janus membership dues, it would be barred by the good faith defense for the same reasons as the agency fee claim. But, of course, Plaintiffs cannot state such claim because membership is a voluntary contractual relationship. Contrary to Plaintiffs' convoluted assertions, dues are not simply that extra amount above the agency fee that members pay. There is no compelled and uncompelled portion of dues. Plaintiffs' attempt to create a distinction between voluntary "membership" and allegedly involuntary "payments" in exchange for that membership (Opp. Br., 11) runs contrary to basic principles of contract law and has been rejected by each court that has considered it. Crockett, 367 F. Supp. 3d at 1008 ("[t]he fact that plaintiffs would not have opted to pay union membership fees if *Janus* had been the law at the time…does not mean their decision was therefore coerced."); Babb, 2019 WL 2022222, at *9; Bermudez, 2019 WL 1615414, at *2.

Membership is offered in exchange for dues, not a part of dues. Dues and agency fees are distinct not merely as to amount, but also associated rights and protections. The same constitutional restrictions applied to the use of agency fees precisely because they were compelled pre-Janus, did not apply to dues. See, e.g., Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292, 302–03 (1986) (requiring objection procedure for

nonmember agency fee payers). At most, what Mr. Pellegrino pled is that he had limited economic options. However, Mr. Pellegrino's decision to join UTN, vote and attempt to influence collective bargaining because he would not save enough money as a nonmember does not obviate his contractual obligations or implicate the First Amendment. See Kidwell v. Transp. Commc'ns Int'l Union, 946 F.2d 283, 292-93 (4th Cir. 1991) ("Where the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced. The employee is a union member voluntarily."); Smith v. Super. Ct. Cty. Of Contra Costa, No. 18-cv-05472-VC, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018) (Janus "does not give [the plaintiff] license to evade his contract."). Like the plaintiff in Smith, Mr. Pellegrino "cannot now invoke the First Amendment to wriggle out of his contractual duties." Smith, 2018 WL 6072806, at *1.

E. Each Plaintiff Lacks Standing As Against Union Defendants

Plaintiffs misunderstand the argument regarding necessary parties. Union Defendants do not insist that Plaintiffs name all the potential defendants in the putative defendant class. However, neither Fed. Rule of Civ. Proc. 19(d) nor 23 obviate the requirement that each named plaintiff in a putative class action have standing and be able to state a claim *prior* to class certification. See Warth v. Seldin, 422 U.S. 490, 502 (1975) ("Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'" (internal citations omitted)); see also O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (if named plaintiffs cannot "establish[] the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class"). Here, neither Plaintiff has standing to assert claims as an agency fee payer against any Defendant. Mr. Pellegrino was never an agency fee payer. Comp. ¶13; Opp. Br., 17. Ms. VanOstrand was an agency fee payer, but she failed to

name or obtain jurisdiction over her local union. As explained in Union Defendants' moving brief (p. 17), NYSUT did not collect agency fees and is a distinct legal entity from ETA.

II. PLAINTIFFS DO NOT HAVE AN EQUITABLE CLAIM FOR REPAYMENT OF PRE-JANUS AGENCY FEES

Plaintiffs contend they are entitled to equitable restitution of pre-Janus agency fees even though such fees were taken in good faith reliance on then controlling Supreme Court precedent and a presumptively valid statute. Opp. Br. at 1-11. Plaintiffs' contention is misplaced and explicitly rejected in Babb, 2019 WL 2022222, at *8; Mooney, 2019 WL 1575186, at *4-5; Crockett, 367 F. Supp. 3d at 1006; Carey, 364 F. Supp. 3d at 1232-33. Initially, no court has held that the good faith defense does not apply to equitable claims.[3] In any event, the facts alleged here would not support equitable relief. Plaintiffs' claims, that their First Amendment rights were violated because of compelled agency fees, sound in law not equity. Plaintiffs do not seek return of a seized cow or a tractor, but rather demand damages for constitutional violations. Further, Plaintiffs would not be entitled to equitable relief even if they had equitable claims under these circumstances.

A. Plaintiffs' Claims Are For Legal Damages

The gravamen of the Complaint is that Plaintiffs' employers and their unions acted in concert to deny Plaintiffs their First Amendment rights (through compelled speech), not deprivation of property. The Complaint states that this action seeks "redress for the defendants'

[3] The Mooney court expressly declined to decide whether the good faith defense would apply to equitable claims because it determined that restitution claims of pre-Janus agency fees sounded in law, not equity. 2019 WL 1575186, at *6. The courts in Babb, Crockett, and Carey determined claims for pre-Janus agency fees sounded in law, avoiding the question. See Babb, 2019 WL 2022222, at *8; Crockett, 367 F. Supp. 3d at 1006; Carey, 364 F. Supp. at 1232-33. Although Plaintiffs cited numerous cases regarding equitable restitution in distinguishable contexts, none addressed the applicability of the good faith defense to equitable claims.

past and ongoing violations of their constitutionally protected rights." Comp., 1.[4] As stated in Carey, "Plaintiffs do not just claim that [the union] unjustly took [their] money; they claim that [the union] utilized a state statute to violate their First Amendment rights by compelling them to support union activities." 364 F. Supp. 3d at 1230. See *supra*, at 4-5 (discussion on why Conversion is not the most analogous tort). Any relief for Plaintiffs' alleged constitutional harm would constitute legal damages. See Carey, 364 F. Supp. 3d at 1230; see also Mooney, 2019 WL 1575186, at *5-6. In Carey, the court further held that the good faith defense is available in restitution cases where the relief sought is legal in nature, and noted that a plaintiff may not circumvent the good faith defense by "simply by labeling a claim for legal damages as one for restitution." 364 F. Supp. at 1232 (citations omitted); see also Mooney, 2019 WL 1575186 at, *4-5 (accord).

Plaintiffs' self-serving characterization that they seek an equitable return of property is immaterial because the allegations in the Complaint do not support an equitable claim. The Supreme Court made clear that claims for restitution sound in law, not equity, when the claim seeks payment out of a defendant's general assets instead of the return of specific, segregated funds that could be the object of a constructive trust or equitable lien, regardless of how the claim is labeled. See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212 (2002); see also Pereira v. Farace, 413 F.3d 330, 340 (2d Cir. 2005). Plaintiffs paid agency fees and dues, which they acknowledge were spent by their unions for collective bargaining and other representational activities, albeit not activities they would have chosen to support. See Comp., ¶¶12-19. Plaintiffs affirmatively assert that "money is fungible" and that agency fees were spent

[4] Plaintiffs seek to "order the NYSUT and its affiliates to repay all 'agency fees' that they unconstitutionally extracted from Ms. VanOstrand and her fellow agency-fee class members" (Comp. ¶45(g)), and to "order the NYSUT and its affiliates to pay *compensatory damages* to every union member in the class represented by Mr. Pellegrino…." Comp. ¶45(h) (emphasis added).

to subsidize collective bargaining activities, potentially freeing up other union resources to be spent elsewhere. Comp., ¶20. Plaintiffs do not and cannot point to any discrete and specific property Union Defendants are holding that belongs to them. Instead, Plaintiffs solely seek money from Union Defendants' general assets. Under these circumstances, "plaintiff then may have a personal claim against the defendant's general assets – but recovering out of those assets is a *legal* remedy, not an equitable one." Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, __ U.S. __, 136 S. Ct. 651, 658 (2016). Since Plaintiffs' claims are for legal damages, there is no question that the good faith defense fully applies.

B. The Good Faith Defense Is Not Limited to Collateral Damages

Plaintiffs broadly assert that "wrongfully taken property taken [sic] must always be returned, even if it was taken in 'good faith.'" Opp. Br., 1. This argument was expressly rejected in Babb and Mooney.[5] In Babb, the court rejected the argument that pre-Janus agency fee restitution is akin to the return of unconstitutionally seized property, specifically rejecting the contention that agency fees were similar to stolen property, for which the remedy may be replevin. Babb, 2019 WL 2022222, at *8. In Mooney, the court similarly rejected the contention that "cases concerning cows and cars, undissipated specific objects, seized in good faith but unconstitutionally" were similar to agency fees exchanged for a service. Mooney, 2019 WL 1575186, at *5.

Moreover, no case cited by Plaintiffs stands for the proposition that wrongfully taken property must *always* be returned even if taken in good faith. That, as a factual matter, property was returned in the cases cited by Plaintiffs does not establish a broad absolute rule, particularly where none of the cases considered the good faith defense and all were factually distinguishable.

[5] Co-Counsel for Plaintiffs herein, Jonathan Mitchell, was also co-counsel in Babb and Mooney.

Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993), pertains to the general law of retroactive effect of Supreme Court decisions, has no discussion at all regarding the good faith defense, and draws no distinction between legal and equitable claims. Likewise, Timbs v. Ind., __ U.S. __, 139 S. Ct. 682 (2019), holds the Eighth Amendment Excessive Fines Clause is incorporated to the States by the Due Process Clause of the Fourteenth Amendment; but does not discuss the good faith defense, and draws no distinction between legal and equitable claims.

The cases cited involving fines pursuant to a statute later declared unconstitutional are also inapplicable. United States v. Lewis, 478 F.2d 835 (5th Cir 1973); Neely v. United States, 546 F.2d 1059 (3d Cir. 1976); DeCecco v. United States, 485 F.2d 372 (1st Cir. 1973); Pasha v. United States, 484 F.2d 630 (7th Cir. 1973); and United States v. Summa, 362 F. Supp. 1177 (D. Conn. 1972); United States v. Lewis, 342 F. Supp. 833 (E.D. La. 1972), all pre-date Wyatt and the Circuit Courts of Appeals good faith defense decisions, and none contain any discussion of the good faith defense. Indeed, these cases were all against the government, and the qualified immunity doctrine, not the good faith defense, would apply. See Messerschmidt v. Millender, 565 U.S. 535 (2012). More significantly, each decision involved fines incidental to convictions; not an exchange of agency fees or dues for collective bargaining services and other representational activities rendered. Cf. United States v. Venneri, 782 F. Supp. 1091 (D. Md. 1991) (holding criminal defendant entitled to restitution paid for criminal conviction based upon an unconstitutional statute).

None of the Circuit Courts of Appeals that considered the good faith defense limited its applicability solely to collateral damages resulting from a taking, or held the defense would not apply but-for the property having been returned. The cases Plaintiffs cite where seized property

was returned all involved some identifiable chattel or other specific property. See Opp. Br. at 6-7. (cattle and tractor, car, real estate, checking account, "materials").[6]

C. Even If Plaintiffs Could Seek Equitable Relief, They Are Not Entitled To It

Even if the allegations stated a claim in equity, this Court should fully apply the good faith defense. Plaintiffs' argument that a court in equity would have no choice but to order return of their property is wrong and has been rejected by every court to consider it. It would be manifestly *inequitable* to order restitution of funds received and expended pursuant to a presumptively valid statute subsequently declared unconstitutional by a change in longstanding Supreme Court precedent. "[R]eliance interests weigh heavily in the shaping of an appropriate equitable remedy." Lemon v. Kurtzman, 411 U.S. 192, 203 (1973) (Burger, C.J., plurality op.) ("Lemon II"); see also Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 427 (8th Cir. 2007) (holding it was an abuse of discretion to order equitable repayment of funds held by private party received pursuant to presumptively valid state statutes subsequently held unconstitutional).

Plaintiffs had no expectation of receiving the collected agency fees, and they received the benefits of collective bargaining paid for by those fees; benefits which cannot be returned. As stated in Gilpin v. Am. Fed'n of State, Cty., and Mun. Emps., AFL-CIO, 875 F.2d 1310, 1316 (7th Cir. 1989), repayment would not be equitable because "plaintiffs do not propose to give back the benefits the union's efforts bestowed on them," which "benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and [state] labor law"; see also Winner, 2016 WL 7374258, at *6 ("[I]f plaintiffs were to receive

[6] While not a good faith defense decision, United States v. Rayburn House Office Bldg. Room 2113 Wash., D.C. 20515, 497 F.3d 654 (D.C. Cir. 2007), similarly sought return of discrete and specific documents seized from the office of a member of the United States House of Representatives pursuant to an unconstitutional search warrant. Notably, the court ordered that some, but not all, of the seized materials be returned.

those fees now, it would result *in a windfall to plaintiffs* and a punishment to [the union] for acting in accordance with state law, which would be contrary to the equitable norms that give rise to these types of claims…. [A] refund of fees would not be consistent with the equitable remedy." (emphasis added)). More recently, the District Court in Babb stated:

> It cannot be overlooked that the pre-*Janus* regime consisted of an obligation by the Plaintiffs to pay fees to the Union Defendants, and a concomitant obligation by the Union Defendants to use those fees to bargain on Plaintiffs' behalf. While the Supreme Court has determined that such arrangement violated Plaintiffs' First Amendment rights, it is not the case that the agency fees remain in a vault, to be returned like a seized automobile. As the Union Defendants cannot retract their performance on this implied contract, it would be inequitable to force them to repay Plaintiffs' agency fees.

2019 WL 2022222, at *8. Indeed, requiring "repayment" as an equitable remedy under these circumstances would "'stand[ ] that remedy on its head.'" Crockett, 367 F. Supp. 3d at 1006.

CONCLUSION

For the reasons set forth above and in Union Defendants' moving brief and accompanying declarations, the Union Defendants respectfully request that the motion be granted and the Complaint be dismissed in its entirety.

Dated: June 6, 2019

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PATRICK DOUGHTY and RANDY SEVERANCE, Plaintiffs,	
v.	1:19-cv-53-PB May 30, 2019 2:01 p.m.
STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, SEIU LOCAL 1984, CTW, CLC, Defendants.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

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P R O C E E D I N G S

THE CLERK: This Court is in session and has for consideration motion hearing in civil matter 19-cv-53-PB, Patrick Doughty, et al., vs. State Employees' Association.

THE COURT: Does anybody want to draw any cases to my attention -- my attention that have been decided since the last supplemental authority that I've been provided with?

No? Okay. All right.

So I'd like the plaintiffs to explain to me why I shouldn't grant the motion to dismiss from the bench for the reasons set forth in the court's opinion in *Babb* and the unanimous reasoning expressed in all of the other district court cases that have addressed the question.

MR. GARRISON: Thank you, your Honor.

I would submit that those cases, they don't take into consideration the proper analysis that the supreme court has put forth to find new defenses and immunities under 1983. Those cases basically state that you have to look to the common law.

THE COURT: So let me -- let me be clear.

Your argument is not that this case is in any way distinguishable; your case is based on the premise

that these opinions are all wrongly decided.

MR. GARRISON: They -- yes, your Honor.

THE COURT: Okay.

MR. GARRISON: So the supreme court has always said that Section 1983, if they find immunities or defenses, you have to look to common law. And if you can find something, usually through an analogous tort or there's a defense at common law, then you can adopt that. Otherwise, you are acting outside of basically what Congress intended and any -- anything else is just pure policymaking. And --

THE COURT: You mean like the government contractor defense Justice Scalia created in the helicopter case?

MR. GARRISON: I'm not sure about that case, your Honor. I apologize.

THE COURT: You don't know about that case?

MR. GARRISON: No.

THE COURT: That's a supreme court case where Justice Scalia, the great critic of judicial activism, created an affirmative defense essentially out of whole cloth and called it federal common law government contracting defense.

MR. GARRISON: Yeah. I submit that this Court shouldn't do that. Basically, you know, if they're

going to -- if a defense is going to be found, it should be found through common law.

Like I said, Congress is --

THE COURT: Can we step back for a second and just tell me how in any version of the world would it be right to require these defendants to pay damages for acting consistent with the requirements of state law and the -- and supreme court precedent?

MR. GARRISON: Because if you look at cases like *Owen*, the supreme court has said the point of 1983 is to make people whole for violations of constitutional law.

THE COURT: But without regard to fault?

MR. GARRISON: That's what Congress enacted, and there is no immunity or defense in Section 1983.

THE COURT: No, you're missing the point. I mean, I'm asking you a broader theoretical question. Of course I'll ultimately decide the question in accordance with what the requirements of law are, but how could you possibly construct an argument that it's right and just to make defendants pay damages for acting in a way that the state law and the supreme court told them to act?

MR. GARRISON: Well, I think the supreme court had foreshadowed that what they were doing was likely unconstitutional.

THE COURT: So the -- the -- the defendants should have disregarded state law, refused to follow state law?

MR. GARRISON: It -- Section 1983 is a deterrent statute. If they had any qualms about what --

THE COURT: So really what you're saying, though, is they should have defied state law. They should have said the Constitution -- even though the supreme court has said this behavior is constitutional, we are -- will refuse to comply with state law because we think the supreme court in the future will change its mind.

MR. GARRISON: I think that's true. If you look at the supreme court's retroactivity jurisprudence, in *Harper* they said that we can apply law retroactively. The unions must have known that. And there's a chance you're violating somebody's First Amendment rights. That's the whole point of Section 1983 --

THE COURT: Is it --

MR. GARRISON: -- is to vindicate people.

THE COURT: Is it true that at the time these defendants were engaging in the conduct that you are challenging that state law authorized the collection of the fees?

MR. GARRISON: Yes.

THE COURT: Okay. So you want them to defy state law.

MR. GARRISON: State law only authorizes these contracts. They don't have to put those in their contracts. These are negotiations between the state and the union. They could have, out of abundance of caution for respecting people's First Amendment rights, not included that in their contract.

THE COURT: I have a lot of trouble seeing it.

So -- all right. So let's go back to your legal argument. Your legal argument is that a good faith defense can only be recognized where you can identify an analog in state law, a state tort affirmative defense of good faith.

MR. GARRISON: I believe that's so, your Honor, because what the supreme court has said is --

THE COURT: Well, didn't the court in *Babb* -- and following reasoning that other courts have looked at -- said the injury that you're suing for is a constitutional injury and the analog to conversion that you're trying to draw just isn't is an appropriate one.

And so you're suggesting that there shouldn't be any good faith defense for engaging in conduct that you in good faith believe is constitutional. You don't dispute that these defendants in good faith, looking at

supreme court precedent at the time they were acting, that they acted in good faith in believing that the -- their actions were constitutional, right?

MR. GARRISON: I would dispute that, your Honor. I --

THE COURT: Really? What is the basis in your complaint or in any facts you want to draw to my attention to suggest that these defendants did not act in good faith?

MR. GARRISON: Well, we think, your Honor, that when *Harris* and *Knox* were decided, they were told that *Abood* was on shaky ground. And so if you can -- I mean, this is a 12(b)(6) motion, so --

THE COURT: Yeah, I'm just saying tell me what you've pleaded that would support a conclusion that --

MR. GARRISON: I don't --

THE COURT: -- a plausible claim that these defendants have acted in bad faith.

MR. GARRISON: Well, I don't think we have to, your Honor. This --

THE COURT: Because you don't think there's a -- so I'm just saying -- yeah, I -- what I'm asking you is essentially to say, Judge, we agree that if there's a good faith defense, we lose, because we are not going to try to prove that these defendants acted in

bad faith; our claim depends entirely upon our view that the law does not authorize a good faith defense in this circumstance.

I think that's what you're saying. If you'll say it, we can move on.

MR. GARRISON: No, no. I -- I would not say that, your Honor, because if you look at cases like *Wyatt*, if the Court finds the common law analog closer to abuse of process, which we don't think it can because that tort just doesn't fit, then we have to be able to prove subjective bad faith. And that's something we can do through discovery in --

THE COURT: How?

MR. GARRISON: -- in summary judgment.

We can look at correspondence the union had, what their internal thoughts were when it came to --

THE COURT: But the law was the law. Their behavior was entirely constitutional at the time they engaged in it.

MR. GARRISON: And that would -- well, that's questionable, your Honor.

THE COURT: Why is it questionable? The supreme court precedent had said that their behavior is constitutional.

MR. GARRISON: The supreme court had said

that, but the law --

THE COURT: But you're -- you are -- you want to take the law back to pre-*Erie against Tompkins*.

You -- your theory of the Constitution is that the Constitution and all law is a brooding omnipresence that is -- in which it is found by the court. It predates humanity. It predates the existence of human beings. There is a constitutional law that does not require any human action and the court just finds it somewhere.

Is that what you're saying?

MR. GARRISON: That -- since the Constitution was ratified, the supreme court -- they find law. They do not make law. The -- the violations in this case have always been --

THE COURT: You've read *Erie against Tompkins*, right?

MR. GARRISON: I -- in law school, your Honor.

THE COURT: Okay. Well, go back to it. Do you know the phrase "brooding omnipresence"? That -- that was a view of the law that has been rejected by the supreme court for over a hundred years.

So I just don't -- I -- I personally don't understand that kind of conception. You're saying that even though the supreme court at the time had declared

the actions to be constitutional, their actions were, in fact, unconstitutional and they're just waiting for the supreme court to correctly declare the law.

MR. GARRISON: I -- I think that's right, your Honor. And the supreme court in *Harris* and *Knox* foreshadowed that, which would reduce any reliance interest anybody had.

Plus, cases -- the -- cases like *Harper* say that the law applies retroactively. If -- if that wasn't the case, then if the supreme court just made law, then there would be no retroactivity.

THE COURT: Okay. So do you want to finish your argument about why a good faith defense requires reference to a common law analog? Is there more you want to say on that?

MR. GARRISON: Right. So Congress in 1871 provided no immunities or defenses. The supreme court has said that if there was -- that basically Congress wouldn't have intended to do away with all of the previous immunities and defenses.

So --

THE COURT: Well, 1983 doesn't provide for qualified immunity.

MR. GARRISON: No, it doesn't, and the court has -- but the court has found exceptions of where

there --

THE COURT: Right.

MR. GARRISON: -- where those were present at common law.

THE COURT: And courts like *Babb* say that you don't look to a common law analog; you look to the same kind of reasoning that led the court to recognize qualified immunity.

And you just think that's wrong, right?

MR. GARRISON: Yeah. I think the supreme court has said that. They have basically -- if you look at Justice King's concurrence in *Wyatt*, he said, we look to the common law because we can't just -- it's just not freewheeling policymaking when we find these things. And if there's a -- if there's no defense in common law, then courts are just making it up; they're just saying, we think --

THE COURT: You think they just make up the qualified immunity for 1983 claims against government officials? They just made it up; is that it?

MR. GARRISON: No, I don't think so, your Honor.

THE COURT: Where'd it come from?

MR. GARRISON: They look to common law. In fact, for absolute immunity, they found these things

were always there in common law, so they were going to apply them. They said Congress couldn't have intended to get rid of these.

But if they're not there at common law, then it's just making up -- Congress -- it just wasn't there. You can't just defy Congress and say that we're just going to create these things without congressional intent.

THE COURT: I'm not a fan of defying Congress.

MR. GARRISON: No, I wasn't saying --

THE COURT: That's not what I do.

MR. GARRISON: -- you. Sorry.

But it's statutory construction, right? Congress is the one that makes the law. They make the defenses and immunities.

THE COURT: Yeah. They didn't make immunity. Immunity was created by the court.

MR. GARRISON: And the court said that the only reason that we're going to do that is because that common law -- Congress would not have abrogated these immunities. That's the whole basis for the immunities and defenses.

THE COURT: You think that the majority of the supreme court, applying their approach to statutory construction today, would say the same thing?

MR. GARRISON: Absolutely not, your Honor.

THE COURT: Yeah.

MR. GARRISON: I think they are looking at precedent. But it -- the -- I mean, the rationale still holds, though, that without Congress providing these things, then it's just common law judging.

THE COURT: Okay. So your view is it's most analogous to conversion. Conversion didn't have a good faith defense; it's not analogous to other torts that do have a good faith defense; you can't find good faith defense unless you can find a state court analog; because you can't, there isn't one; because there isn't one, the plaintiffs' claim -- the defendant's motion to dismiss should necessarily be denied.

MR. GARRISON: Exactly, your Honor.

THE COURT: All right. Is there anything more you want to add on that subject?

MR. GARRISON: No.

THE COURT: All right. Thank you.

I'll hear your response.

MS. RAVINDRAN: I'll be brief, your Honor.

So I think your Honor has already drilled down to what the dispositive fact in this case is, which is as the plaintiffs acknowledged in their brief, their claim is directed solely at fees that were collected

prior to the *Janus* decision. It is indisputably the case that those fees were collected -- were authorized by New Hampshire law and were upheld as constitutional by the then-controlling law.

THE COURT: If you accept the plaintiffs' premise that it would be improper as a matter of statutory construction to recognize an affirmative good faith defense unless you can find an analog in state common law, if you accept that premise -- and I know you don't, but if you accept that premise as a starting point, what would you say is the most analogous tort in which a common law defense has been recognized?

MS. RAVINDRAN: Right. So the -- the analog that I would use is abuse of process and it's for this reason.

So the reason that we are here on this Section 1983 claim with -- as with the private party, as my client is, goes back to *Lugar*. It's the reason that -- that the conduct here falls under the -- you know, arguably falls under the rubric of under color of state law is that the defendant, acting with participation of state officials, had invoked a state process by which fees were deducted by the state, by the plaintiffs' employer, and then remitted to the union. So and it's that use of the state process is the reason

that we are even here for a Section 1983 --

THE COURT: Explain that to me in a little more detail.

MS. RAVINDRAN: Yes. So the way fair share fees, the fees that are at issue here, are collected under the state procedure that's set up here in New Hampshire is under the New Hampshire Public Employee Labor Relations Act, unions are authorized to negotiate and to collect a bargaining agreement, a fair share fee requirement. And the collective bargaining agreement that is at issue here and the time period that's relevant here authorized the deduction -- required the payment of fair share fees by employees like the plaintiffs who are in the bargaining unit that is represented by the union, but who declined to become members of the union.

THE COURT: Right. So it is that process that you say authorizes the fees and to the extent there was a wrong, it was a misuse of that process. Since the most analogous tort in your view would then be abuse of process and a good faith defense was available to an abuse of process tort, it should be -- also be recognized here.

MS. RAVINDRAN: Correct --

THE COURT: Okay.

MS. RAVINDRAN: -- that would be our position under that analysis.

THE COURT: All right. Now, what do you say to his -- I assume you take the same position as the court did in *Babb* that it is not necessary to find a state law analog to the good faith defense that you're asking us to -- asking the Court to recognize here.

What do you say to the defendant's argument that any defense to a 1983 claim can only be recognized -- and he says including qualified and absolute immunity are all derivative of state common law claims and, therefore, to the extent that the court in *Babb* or you contend that there isn't a need for state law analog, it's inconsistent with supreme court precedent? What do you say to that?

MS. RAVINDRAN: Well, what I would say is that if we -- and we can go back to Justice Kennedy's concurrence in *Wyatt*, as plaintiffs have cited, where -- which is where the roots of the good faith defense first started. And what Justice Kennedy says in that concurrence is that there was support in the common law for the proposition that it is reasonable as a matter of law for a private citizen to rely on a state statute prior to any judicial determination of unconstitutionality.

So that -- that is already embedded in the common law and that is the rationale that -- in the five circuit courts that have had occasion to address the good faith defense, who adopted that rationale of that --

THE COURT: This goes way beyond that. This is a case where they -- the defendant had not just state law that authorized the specific action they engaged in, but supreme court precedent --

MS. RAVINDRAN: Correct.

THE COURT: -- recognized that their actions were entirely consistent with the Constitution.

MS. RAVINDRAN: That's correct, your Honor.

So applying the good faith defense into the circumstances of this case is actually a small subset of the -- of what the other circuit courts who have had reason to address the issue of the good faith defense have recognized. Because in those five circuit courts, there was no on-point supreme court decision that had evaluated the exact same conduct that was at issue in the Section 1983 claim.

There was a state -- a state law that authorized the conduct and under those circumstances, those courts did recognize a good faith defense that would be applicable in that situation.

Our case is much stronger, in my view, because there is -- if you take the language in the Fifth Circuit in *Wyatt*, which was the first circuit court to recognize the good faith defense, the standard they use is whether they knew -- whether the defendant knew or should have known that the statute they're relying on is constitutional.

At the time period in which the fees were collected, there's no question that the statute on which the union was relying on was constitutional because *Abood* had -- was the controlling law of the land at that time and it had addressed the exact same conduct that is at issue here.

THE COURT: Yeah, I -- as I said, stepping away from the pure technical legal analysis, it is incomprehensible to me the idea that under the unique circumstances of this case, which is something that will occur very rarely during the life of the country --

MS. RAVINDRAN: Right.

THE COURT: -- in which the supreme court decides to flatly overturn its prior precedent -- we want people to rely on our decisions. One of the reasons that judges express their views in written opinions is so that people can rely on it. And then to suggest that when judges flip 180 degrees on the law

that people who we want to rely on our decisions are then subjected to suits for damages because we changed our mind seems arrogant in the extreme.

It -- it's incomprehensible to me that courts would allow for damage actions to be maintained under those unique circumstances. I just -- I can't even begin to understand the idea that any court could award -- allow an action to proceed in a case like this. I -- I mean, it's just incomprehensible.

We want -- we issue decisions and we want people to follow them. We don't want people -- to tell people, look, follow us, but if we decide to change our mind later, you're going to have to pay damages. That -- that's crazy.

MS. RAVINDRAN: I agree with every word of that, your Honor.

THE COURT: All right. So, in any event, what else would you like to say?

MS. RAVINDRAN: Unless the Court has questions --

THE COURT: No, I want to hear a response to anything that's been said by the defendant's counsel.

MR. GARRISON: Your Honor, I would just like to respond to a couple points.

So the first one being about people not being

liable for damages. Our clients had their constitutional right violated; their First Amendment rights --

THE COURT: No, I doubt -- I don't even understand that. I thought their constitutional rights were actually -- were not violated at all because the supreme court at the time the actions occurred said that their conduct was constitutional.

MR. GARRISON: So basically in saying that --

THE COURT: The supreme court changed the law. You have -- you -- you have this idea that the law was always there and it was always unconstitutional, but it was just hidden because the supreme court was screwed up when they said something. And I just have a different conception of the way the law works.

MR. GARRISON: I understand, your Honor, but as the supreme court said, the retroactivity jurisprudence says these cases are retroactive to every case that's open.

So our clients' First Amendment rights were violated. They had their money taken, spent on idealogical things that they did not want. They objected the whole time.

If there's a -- if this is purely equities and not a statutory interpretation case, then those equities

need to be balanced. I don't think there's any opinion that has ruled on this case that has looked to our clients' or other people's First Amendment rights when balancing the equities. As the supreme court said in *Owen*, 1983, the history and purpose of it was to give people damages for --

THE COURT: The State Employees' Association is an association of current and former employees, is that -- state employees? Is that what the -- the State Employees' Association is?

MR. GARRISON: Yes.

THE COURT: Yeah.

MR. GARRISON: Yes.

THE COURT: And so what you're saying now is people who are -- who are paying fees to support the State Employees' Association today should be required to have their money diverted to pay employees for things that happened in the past. So we should take money from them and give it to these employees whose -- whose conduct --- who were injured, in your view, in the past. So it's basically taking money from someone who's done nothing wrong, through their association, and giving it to your clients because they were wronged.

MR. GARRISON: If you look at the supreme court's jurisprudence in *Owen*, that's pretty much

exactly what they were doing. It was a municipality. This is a private association corporation. And if we're going to decide who the equities go for, then it should be the people that got their First Amendment rights violated. Most of --

THE COURT: Yeah, I don't agree with that. It's not -- I don't think it matters one way or the other to the analysis of the questions raised by your complaint.

MR. GARRISON: Well, the -- what I'm saying is if -- if we're just going off pure equities, not looking at common law statutory construction, we'd just ask the Court to balance the equities. That's what they're asking for. They're asking for basically an affirmative defense based in policy.

THE COURT: Okay. Why -- why is not abuse of process the better analog than conversion?

MR. GARRISON: Because abuse of process is an historical tort, is using the court system to basically try and get people's property through unconstitutional means.

THE COURT: All right. Aren't they using process authorized by state law?

MR. GARRISON: Your Honor, if you define process at that level of generality, then everything is

an abuse of process tort. We just don't believe that -- they're trying to shoehorn that in here and it just doesn't fit. The most analogous tort is conversion. They took people's property against their will and spent it on stuff that they did not want, on idealogical activities that they did not want. Their First Amendment rights were violated and -- by taking their money and spending it.

THE COURT: Okay. What else would you like to say?

MR. GARRISON: I would just like to say that the Ninth Circuit cases, *Babb* included, are all following *Clement*, which did not do a common law analysis. It just assumed that there was a good faith defense, applied it to the facts of the case. So the Ninth Circuit cases, *Babb* included, are basically just ruling on these free from any common law basis. I mean, some in passing have said, you know, this is more likely the abuse of process, but haven't given it really any analysis. We just ask the Court --

THE COURT: Well, *Babb* -- *Babb* does that analysis.

MR. GARRISON: Well, it -- not in any -- I don't think it does it in any proper -- it doesn't give it the proper, I don't know, analysis that it deserves.

THE COURT: All right. Hang on a minute.

MR. GARRISON: It does give an analysis. I apologize, your Honor.

THE COURT: I thought it did. I just -- I -- I just wanted to look through.

And when I read it earlier, I understood it to present that analysis. But you can disagree with it. I --

MR. GARRISON: Yeah, I do disagree with it. And it's just -- we think it's a little -- you know, it's in one paragraph.

THE COURT: Yeah.

MR. GARRISON: So ...

THE COURT: That's fine. I understand that.

Anything else that you'd like to say?

MR. GARRISON: No, your Honor.

THE COURT: Okay.

MR. GARRISON: I just would like to close with, you know, if we're going to be balancing equities, we would like the Court to take into consideration that our clients had their First Amendment rights violated and we don't think that any of the previous cases have done that.

THE COURT: All right. And I -- and, believe me, I think it's very important for courts to pay

careful attention to First Amendment considerations. I don't think you'll find a judge who has a more aggressive enforcement of First Amendment rights than me. The only two times I have found state statutes to be unconstitutional are claims -- cases in which those state statutes have been applied to violate the First Amendment rights of the plaintiffs. One was a pharmacy information law that violated the rights of the plaintiffs in that case. I invalidated the law on First Amendment grounds. I was reversed by the First Circuit. My position was ultimately endorsed by the supreme court and my view prevailed.

A couple years -- a few years ago, I invalidated a law that banned what are called ballot selfies on First Amendment grounds. My view on that point was upheld by the First Circuit Court of Appeals.

I fully endorse vigorous enforcement of people's First Amendment rights. In my view, this issue has nothing to do with that. It -- the underlying claim is a First Amendment claim, but the -- the fundamental problem here is that this is a case that requires a good faith defense, in my view. It's a case in which without regard to a state law analog, a good faith defense must be available to protect defendants under these kinds of circumstances and it can -- its existence can be

inferred from supreme court precedent recognizing the qualified immunity doctrine in a related context.

To the extent that a state law analog is required, I agree with the plaintiffs in this case that abuse of process is a much stronger analog than conversion. A good faith defense has traditionally been recognized for abuse of process torts and it's appropriate to analogize to that.

I don't believe conversion is the appropriate analogy here. The injury to your clients, as the court points out in *Babb*, is an -- a First Amendment injury. It's an injury to their dignity and autonomy in being forced to support speech that they don't agree with. That tort is not really a conversion tort and I think the abuse of process tort is a better analog. To the extent that a future court should decide that there must be a state law analog, I agree with the court in *Babb* that abuse of process provides the better analog.

I find the reasoning of the court in *Babb* to be very carefully expressed. I don't find there to be any facts in this case as pleaded in the complaint that distinguish the -- your clients' claims from the claims that were at issue in *Babb*. I recognize that *Babb* was decided in the Ninth Circuit and is subject to Ninth Circuit precedent. It doesn't restrict me here.

But I find the reasoning that underlies that precedent to be entirely persuasive. I endorse it. I don't find any basis on which to distinguish your case from the cases in which courts around the country have unanimously agreed that your cause of action is subject to a good faith defense. I do not see any -- any unusual circumstances in this case which would prevent me from recognizing the existence of a good faith defense and determining that it's appropriate to consider it here on a Rule 12(b)(6) motion.

Of course, in ruling on a 12(b)(6) motion, I -- I am required to follow the standard adopted by the supreme court in *Iqbal* and *Twombly*. I'm required to examine the complaint, strike out any allegations in the complaint that are conclusory, look at what remains and ask whether it states a plausible claim for relief.

First Circuit precedent does allow me to grant a motion to dismiss in certain circumstances based on the availability of an affirmative defense. As I've explained, I believe for the reasons set forth by the court in *Babb* and the other courts that have reached a similar conclusion that a good faith defense is available to the plaintiffs here and I agree -- I agree with those courts that it is appropriate to recognize that defense and apply it here in response to the

complaint that you have brought.

Doing that, and using the 12(b)(6) standard, I have concluded that even construing the allegations in the complaint in the light most favorable to you that you have not stated a plausible claim for relief in light of the affirmative defense that I find is available to the plaintiff.

Accordingly, I grant the motion to dismiss. And I don't see any reason to allow you leave to amend because there doesn't appear to be any -- to be any unusual circumstances that would require an amendment or that an amendment could cure the defects that I've identified in the complaint.

I think you'd be better off, frankly, just devoting your resources to an appeal. So you should try to get the First Circuit to reach a different conclusion from me, which I respect that it's always possible that it could do. And that's where you really need to be expending your time and your energy.

I don't think I have anything to add to the analysis that the other district courts that have taken it on have addressed, but if you think there's more that I need to do, questions that you think I need to respond to, tell me now and I'm happy to provide further analysis to support my conclusion. But I think I've

made clear to you how I think about the case and as I said, I -- I think you should go ahead and appeal and see what the First Circuit says.

But do you want -- is there more you need me to do by way of analysis so that the case can be ready for appellate review by the First Circuit?

MR. GARRISON: I don't think so, your Honor.

THE COURT: All right.

Is there anything more that the plaintiff wants me to do?

MS. RAVINDRAN: No.

THE COURT: I really don't see any point in writing -- not because I think your argument is legally frivolous. I want to be clear about that. First Amendment issues are important. People like you should be able to come to the courts and express novel ideas about how your clients should be entitled to relief. I respect that and I'm not saying your claims are frivolous.

I'm saying I just can't conceive of how they could ever be allowable under the law as I understand it to be. And to the extent you wish to break new ground, the fact that all the other courts are ruling against you shouldn't deny you an opportunity to seek review from an appellate court that's very experienced at

addressing First Amendment claims and issues of this sort.

And so I -- I'm not, in ruling from the bench, intending to suggest that your claim is frivolous. I'm merely suggesting that I don't see how it can possibly proceed. And to the extent I would allow it to proceed, I would need guidance from the First Circuit explaining to me why the claim is potentially viable. And that's all I'm trying to say here today. Okay?

All right. Is there anything else we need to do today?

All right. The defendant's motion to dismiss is granted.

Thank you.

MR. GARRISON: Thank you.

(Proceedings concluded at 2:35 p.m.)

C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 6/6/19

/s/ Liza W. Dubois
LIZA W. DUBOIS, RMR, CRR